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No. 70523-7-1

IN THE COURT OF APPEALS OF THE STATE OF

WASHINGTON FOR DIVISION ONE

STATE OF WASHINGTON

Respondent,

v.

NICHOLAS JAMES LONGO,

Petitioner.

PETITION FOR REVIEW OF DECISION OF COURT OF APPEALS

FOR DIVISION ONE

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A. Identity of Moving Party

Nicholas Longo, petitioner herein, asks this court to accept review of the decision of the Court of Appeals as described in B.

B. Court of Appeals Decision

The Court of Appeals for Division One decision filed on February 9, 2015 reversed the judgment of the Superior Court and dismissed the criminal charge against petitioner and remanded the case for trial. A copy of the decision is attached to this petition as Appendix 1.

C. Issues Presented for Review

Whether collateral estoppel effect should be given to the ruling of the District Court finding that a search warrant failed to establish probable cause in a civil forfeiture brought by a municipality in the companion criminal prosecution brought in Superior Court?

D. Statement of the Case

The Court of Appeals decision sets forth the facts of the case. The seminal facts are a small grow of marijuana plants was discovered during the execution of a search warrant. The police seized $6500 in cash and thus commenced a civil forfeiture while, at the same time, petitioner was arrested and charged with manufacturer of marijuana in Superior Court.

The Court of Appeals decision adopts a bright line rule denying preclusive effect to final judgments in civil forfeitures by the District Court[1] to companion criminal proceedings. The rationale for the

[1] Would it make any difference if the amount of the forfeiture exceed $50,000 and was removed to the Superior Court and thus the suppression hearing came out of the Superior Court? Petitioner perceives no as there is nothing in the judicial decision making process on suppression hearings different from the Superior Court and the District Court; yet the norm deference given to the judgments of a competent court of jurisdiction is withdrawn by judicial endorsement of giving preeminence to the state's special interest in pursuing without inhibition the prosecution of criminal activity.

decision is that the two of the four factor test for determining whether to apply collateral estoppel enunciated in Christensen v. Grant County Hop. District 1, 152 Wn2d 299, 96 P.3d 957 (2004) specifically factors 3 and 4, are not satisfied.

Factor 3 requires privity and the Court of Appeals finds no privity and distinguishes Barlindahl v. City of Bonney Lake 84 Wa. App. 135, 141, 925 P.2d 1289 (1996). Petitioner sees the facts here as essentially the same as in Barlindahl where the Superior Court ruled the search warrant deficient and dismissed the case. This final ruling in the criminal case was later given collateral estoppel effect in the forfeiture action brought by the City of Bonney Lake. The police involved were municipal, like the City of Bellingham in the instant case, and the Court of Appeals for Division 2 stated the Bonney Lake Police Department and Pierce County "had a mutual interest and shared a common purpose in a successful prosecution of Barlindahl as well as a successful forfeiture of his possessions, Barlindahl 84 Wa. App. At 143. As in Barlindahl, the Bellingham police officers here would testify in both hearings. Incidentally, Shannon Conner, a deputy prosecuting attorney, representing the State, secured the search warrant based upon the testimony of the Bellingham police officer.

In rejecting the argument that the City of Bonney Lake was not in privity with the county prosecutor, the Barlindahl court in concluded:

> These factors demonstrate that Bonney Lake and Pierce County were in privity from beginning to end. Their mutual objective was to work together to lawfully obtain evidence; they both sought to obtain a criminal conviction; and both could have benefited financially from either a successful prosecution or a successful civil forfeiture. Bonney Lake's argument that it was not in privity with Pierce County because it did not have an opportunity to present its arguments concerning the validity of the search is without merit. It is the obligation of a county prosecuting attorney to control a felony prosecution; the inability of a municipal attorney to control the prosecution does not diminish the common

> interests that both agencies have in the outcome of the prosecution; 84 Wa. App. 143 and top of 144.

The Court of Appeals opinion here reasoned that Barlindahl does not control because there was no joint operation, that the City was the seizing agency and the prosecutor had no control over the forfeiture proceeding. Slip Opinion page 4.

Even though the Court of Appeals expressed its view that there is no privity between the City of Bellingham and the State of Washington, it restricted its holding to reliance upon factor 4 alone, if necessary, to sustain its holding. The Court of Appeals stated: "We conclude that applying collateral estoppel would work an injustice against the State independent of whether the State and the City were in privity, Slip Opinion at page 7.

So in this case, which raises as a matter of first impression, the Court of Appeals decision rests ultimately upon the legitimacy of its holding that public policy is best served if the District Court rulings are not given later preclusive effect in a criminal prosecution, which is exactly the opposite of the ruling in Barlidahl in which the Court of Appeals for Division 2 found that public policy is advanced by the application of collateral estoppel.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This case presents the issue of whether there should be an exemption under the norm rules for application of issue preclusion in criminal cases, where the ruling, on which the collateral estoppel is to be applied, is a judgment of the District Court suppressing evidence and dismissing civil forfeiture arising out of the same facts.

Petitioner Longo meets the criteria set forth in RAP13.4 (b) (2) because the decision in this case conflicts with the decision of Division 2 of the Court of Appeals in Barlindahl v. City of Bonney Lake 84 Wa. App. 135, 925 P.2d 1289 (1996). Moreover, Longo meets the criteria of RAP 13.4 (4) because this case involves an issue of substantial

public interest that should be determined by the Supreme Court, which is the balancing of the interests and right of the property owner and simultaneous criminal defendant, and the interests of the state to prosecute crime. The citizen has the right to vigorously defend himself/herself and his property pursuant to the rights provided for in the forfeiture statute, which include a right to speedy trial and resolution. These interests are subordinated to the interest of the State to prosecute criminal activity.

The decision in this case significantly increases the impact of the filing of the criminal charges by County Prosecutor and the prosecution of an quasi-criminal forfeiture pursuant to RCW 69.50.505 by a municipality. The confluence of these two lawsuits against the citizen exacts the greatest pressure the state can exert upon the citizen. By denying preclusive effect to a valid decision of the District Court, the Court of Appeals has erred by subordinating the right of the property owner by statute to vigorously defend his property to the state's interest in pursuing unencumbered criminal prosecution. The Court of Appeals contravenes proper public policy because it, without reason or justification, diminishes the authority and power of the District Court to make definitive decisions that have norm preclusive effect. For inevitably, affirmance of the Court of Appeals' decision will diminish the ability and incentive of the property owner to vigorously litigate the forfeiture and lead to a defacto stay of the forfeiture proceeding until the definitive resolution is decided by the Superior Court in the criminal action. The Court of Appeals choice also diminishes the authority and legitimacy of District Court's rulings for its eliminates one of the aspect of the legitimacy of its rulings- the District Court's entitlement to have its rulings binding on other legal controversies addressing the same legal issue. One unique consequence of the Court of Appeals ruling is that it selectively eliminates preclusive effect to only one category of case that the District Court has jurisdiction to decide- forfeiture cases. And the reason for the non application of

collateral estoppel is the special need and requirement that the State be able to pursue criminal prosecution in drug cases with any worry about an unsuccessful result in the forfeiture case.

Petitioner also respectfully disagrees with the Court of Appeals conclusion that proper public policy supports non application of collateral estoppel. Forfeitures have been defined in Deeter v. Smith 106 Wn2d 371, 721 P.2d 519 (1986) as quasi criminal prosecutions. The proof needed to sustain the forfeiture is almost always identical to what is presented in the criminal trial but the burden of proof is lower. As the court found in Barlindahl, there was an overriding pubic policy that prevented the application collateral estoppel to the Superior Court order suppressing and dismissing the criminal case to the companion forfeiture. Why is the government's interest not substantial enough to disqualify the Superior Court order in Barlindahl because the state interest in pursuing quasi criminal forfeitures is great? But if issue preclusion comes from a District Court's dismissal in the forfeiture action, public policy is disserved by application of issue preclusion in the criminal case? There is nothing wrong with the District Court's adjudication, which warrants non application of the principles of collateral estoppel.

Cases cited by the Court of Appeals as supporting its finding that public policy would contravened by granting estoppel effect to the District Court rulings include State v. Williams. 132 Wn.2d 248, 937 P.2d 1052 (1997) (welfare fraud); State v. Cleveland. 58 Wn. App. 634, 794 P.2d 546 (1990), State v. Vasquez. 148 Wn.2d 303, 317-18, 59 P.3d 648 (2002) State v. Vasquez, 148 Wn.2d 303, 317-18, 59 P.3d 648 (2002) (driver's license revocation). Petitioner reads those cases are all primarily grounded in the inadequacy of the forum and questions about the thoroughness of the decision making process. In Longo, there is the decision from a court of competent jurisdiction.

There is no inadequacy in the decision making process of the District Court plus the seizing agency has the right to appeal.

E. CONCLUSION

This court should review the decision the Court of Appeals because there is privity between the City of Bellingham and the State. More importantly, the public policy exception for precluding collateral estoppel is not present here because there is no deficiency in the adjudicative process or adequacy of the District Court whose rulings are entitled to preclusive effect. The due process deficiency found in administrative hearings or and dependency proceedings State v. Williams. 132 Wn.2d 248, 257- 58, 937 P.2d 1052 (1997) (welfare fraud); State v. Cleveland. 58 Wn. App. 634, 643-44, 794 P.2d 546 (1990), State v. Vasquez. 148 Wn.2d 303, 317-18, 59 P.3d 648 (2002) do not apply in the litigation of forfeiture hearings before courts of law such as the District and Superior Courts.

There is a constitutional public policy served by the preservation of privacy in the modern age in the face of government's ability to investigate, forfeit property and prosecute for crimes. Art. 1, Sec. 7 embodies our state's values to privacy. A decision by a District Court on privacy issue such as whether a search warrant is supported by probable cause is diminished when its decisions do not have the norm effect because it impinges upon the power and discretion of the state to prosecute crime. There is no reason why the District Court order should be denied preclusive effect.

Respectfully submitted this 11th day of March, 2015

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Appellant/Cross Respondent, v. NICHOLAS JAMES LONGO, Respondent/Cross Appellant.	No. 70523-7-I DIVISION ONE PUBLISHED OPINION FILED: February 9, 2015

APPELWICK, J. — The State appeals the superior court's suppression of evidence and dismissal of criminal charges based on collateral estoppel from a related civil forfeiture proceeding. Bellingham police officers found a marijuana grow operation in Longo's home during the execution of a search warrant. The State brought criminal charges and the city of Bellingham initiated a civil forfeiture proceeding against him. In the civil forfeiture proceeding, Longo moved to suppress evidence of the marijuana. He argued that the warrant was not supported by sufficient probable cause that his marijuana grow operation violated the Washington State Medical Use of Cannabis Act.[1] The district court granted his motion to suppress and dismissed the civil forfeiture action. The superior court then found that it was bound under the collateral estoppel doctrine by the district court's decision that the underlying warrant was not valid. The superior court suppressed the evidence and dismissed the criminal charges. We reverse and remand.

FACTS

On September 11, 2012, Bellingham police officers executed a warrant to search Nicholas Longo's house. Inside, they found 180 marijuana plants growing in a

[1] Chapter 69.51A RCW.

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sophisticated operation including lights, watering systems, vents, and timers. They also found several pounds of packaged marijuana, packaging materials, and a digital scale. Longo was arrested and charged with one count of unlawful manufacturing of a controlled substance – marijuana and one count of unlawful possession of a controlled substance with intent to deliver. The city of Bellingham (City) also notified Longo that it sought forfeiture of $6,350 seized during the search.

In both the civil forfeiture proceeding and a criminal pretrial hearing, Longo moved to suppress all evidence obtained as a result of the search. He argued that the 2011 amendments to the Washington State Medical Use of Cannabis Act (MUCA) made the medical use of marijuana a lawful act, rather than an affirmative defense. Longo asserted that, to lawfully search his house, officers needed probable cause that his suspected marijuana growing was not authorized under MUCA.

On January 18, 2013, the district court granted Longo's motion to suppress and dismissed the forfeiture action. The City abandoned its appeal and the dismissal became final.

Longo then moved to dismiss his criminal case, arguing that the superior court was collaterally estopped from reconsidering the validity of the search warrant. On June 18, 2013, the superior court granted Longo's motion to suppress on collateral estoppel grounds. The court noted that it would have rejected Longo's probable cause argument.

The State appeals, asserting that collateral estoppel is inappropriate here. Longo cross appeals, arguing that we may affirm on probable cause grounds and requesting a stay until the Washington Supreme Court considers the issue.

DISCUSSION

I. Collateral Estoppel

The State argues that the superior court erred in giving preclusive effect to the district court's order granting Longo's motion to suppress. The State maintains that the collateral estoppel doctrine is inapplicable in this context and to apply the doctrine here contravenes public policy.

Collateral estoppel is a judicially created doctrine designed to conserve judicial resources and provide finality to litigants. State v. Barnes, 85 Wn. App. 638, 652-53, 932 P.2d 669 (1997). It bars relitigation of an issue in a subsequent proceeding involving the same parties. Christensen v. Grant Cnty. Hosp. Dist. No. 1, 152 Wn.2d 299, 306, 96 P.3d 957 (2004). The party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the issue in the first proceeding. Id. at 309.

A party asserting collateral estoppel bears the burden of proving that (1) the issue decided in the prior adjudication is identical to the one presented in the second proceeding, (2) the prior adjudication ended in a final judgment on the merits, (3) the party against whom the doctrine is asserted was a party or in privity with the party to the prior adjudication, and (4) application of the doctrine does not work an injustice. Id. at 307. We review de novo whether collateral estoppel applies to bar relitigation of an issue. Id. at 305.

Here, the first two prongs are clearly satisfied. First, the legal issue was the same in both proceedings: whether the evidence should be suppressed, because there was insufficient probable cause to support the search warrant. Second, the district court dismissed the forfeiture action pursuant to granting Longo's motion to suppress. The City

abandoned its appeal and the dismissal became final. This constitutes a final order. See Barlindal v. City of Bonney Lake, 84 Wn. App. 135, 142, 925 P.2d 1289 (1996).

The State argues that the third element, privity, is not present here. "Privity" is the "connection or relationship between two parties, each having a legally recognized interest in the same subject matter." BLACK'S LAW DICTIONARY 1394 (10th ed. 2014). In Barlindal, the court found that Bonney Lake and Pierce County were in privity where the county brought criminal charges against Barlindal and the city subsequently sought forfeiture of his property. 84 Wn. App. 143-44. The court reasoned that both participated in the acquisition of a search warrant and the subsequent search; either could have been the seizing agency entitled to bring the forfeiture action; and both would have financially benefited from an order of forfeiture. Id. at 143. Likewise, in Barnes, the court found privity between Clallam County, which initiated a forfeiture proceeding against Barnes, and the State, which subsequently brought criminal charges against him. 85 Wn. App. at 652. The court noted that both entities were represented by the prosecutor; both relied upon the same warrant and search; and either could have benefited from an order of forfeiture. Id.

Here, however, there was no joint operation between the two entities. Only the City obtained and executed the search warrant. By statute and on these facts, the City, but not the State, was a seizing agency with the authority to commence forfeiture proceedings. See RCW 69.50.505(3). Therefore, the prosecutor was not entitled to be involved in—let alone have control over—the forfeiture proceeding. The only interest the State had in the forfeiture was its statutory recovery of ten percent of the net proceeds

from forfeited property. See RCW 69.50.505(9)(a). This is insufficient to constitute a mutuality of interests. The privity prong is not satisfied here.

The State further argues that to apply the collateral estoppel doctrine here would result in an injustice. It cites to Barnes, where the court considered similar facts and concluded that "compelling public policy considerations" weighed against collateral estoppel. 85 Wn. App. at 653. There, Clallam County sought forfeiture of property seized from Barnes's home. Id. at 647-48. The trial court found insufficient evidence of criminal behavior and dismissed the forfeiture. Id. The State then filed criminal charges against Barnes. Id. Barnes moved for dismissal, arguing that collateral estoppel barred the subsequent criminal prosecution. Id. The trial court denied his motion. Id. The Court of Appeals affirmed, reasoning in part that

> The purpose of the criminal code is to protect the community from "conduct that inflicts or threatens substantial harm to individual or public interests." It does so, in part, by incarcerating the perpetrator. The community also has an interest in promoting respect for the law by providing just punishment.
>
> A civil forfeiture action may deter crime, but it cannot halt the defendant's criminal activity by incarcerating him. Nor does it satisfy the public policy of punishing the defendant in proportion to the seriousness of the offense and his criminal history.

Id. at 653 (citations omitted) (quoting RCW 9A.04.020(1)(a)). Criminal prosecutions and civil forfeiture proceedings have different purposes and provide the State with different incentives. Compare RCW 9A.040.020(1)(a) with LAWS OF 1989, ch. 271, § 211. We find this rationale compelling.

Longo, on the other hand, urges this court to affirm under Barlindal, where the court found that public policy compelled the application of collateral estoppel. 84 Wn.

App. at 145. But, the Barlindal court's reasoning is inapplicable on these facts. There, the court focused on Bonney Lake's opportunity to present evidence and arguments in the criminal proceeding. Id. at 144. This was not the case here. The State was not a party to the civil forfeiture proceeding. The Barlindal court also reasoned that it would contravene public policy to allow multiple jurisdictions to bring separate forfeiture proceedings. Id. at 145. Again, that is not a concern here. The State was not a seizing agency and could not bring a separate forfeiture action against Longo.

Furthermore, this case presents a different scenario than in Barlindal. Here, the civil forfeiture preceded the criminal prosecution. This is a crucial distinction. The prosecutor has the constitutional and statutory authority to prosecute all criminal actions in which the State or county is a party. WASH. CONST. art. XI, § 5; RCW 36.27.020(4). Applying collateral estoppel in this context would allow a municipality to preempt that authority and foreclose an otherwise proper prosecution by the State. And, it could provide a strategic incentive for defendants to seek expedited forfeiture proceedings with the intent to foreclose the prosecution of criminal charges. We think the legislature would be shocked to find that the civil forfeiture proceedings it established to deter crime would instead preclude prosecution. See LAWS OF 1989, ch. 271, § 211. The legislature certainly did not intend such a result.

Clearly, public policy considerations weigh against applying collateral estoppel in this context. Application of the doctrine could also force the State to choose between fully litigating guilt in civil proceedings—defeating the purpose of the expedited forfeiture process and depleting already scarce prosecutorial resources—or abandoning civil forfeitures altogether. In the administrative context, several Washington cases have

addressed these concerns and found that public policy dictates against collaterally estopping criminal prosecution.[2] See, e.g., State v. Vasquez, 148 Wn.2d 303, 317-18, 59 P.3d 648 (2002) (driver's license revocation); State v. Williams, 132 Wn.2d 248, 257-58, 937 P.2d 1052 (1997) (welfare fraud); State v. Cleveland, 58 Wn. App. 634, 643-44, 794 P.2d 546 (1990) (dependency proceeding).

We conclude that applying collateral estoppel would work an injustice against the State independent of whether the State and the City were in privity. We hold that collateral estoppel is not available to preclude a criminal prosecution based on an evidentiary ruling in a civil forfeiture proceeding. We reverse the superior court's dismissal of Longo's criminal case on the basis of collateral estoppel.

II. Longo's Cross Appeal

Longo asserts that the superior court erred in dismissing his probable cause argument. But, this court has since rejected the assertion that officers must have probable cause not only of marijuana use, but of a violation of medical marijuana law. State v. Reis, 180 Wn. App. 438, 440, 322 P.3d 1238 (2014), review granted, ___ Wn.2d ___, 336 P.3d 1165 (2014); State v. Ellis, 178 Wn. App. 801, 807, 327 P.3d 1247 (2014).

The Washington Supreme Court granted review in Reis on October 9, 2014. Longo requests that we stay his cross appeal until the Supreme Court resolves the issue. We may order a stay if we are convinced the stay is necessary to avoid undue prejudice

[2] We acknowledge the distinction between administrative proceedings and civil forfeitures, which are quasi-criminal in nature. See Deeter v. Smith, 106 Wn.2d 376, 378, 721 P.2d 519 (1986). But, these cases raise concerns that apply equally in the forfeiture context. And, although the district court's ruling was a purely legal decision made by a trial judge, it nonetheless interfered with the prosecutor's authority to pursue criminal prosecutions.

to a party's prosecution or defense of a matter. In re Marriage of Herridge, 169 Wn. App. 290, 302, 279 P.3d 956 (2012). The party requesting a stay must make out a clear case of hardship or inequity in being required to go forward. King v. Olympic Pipe Line Co., 104 Wn. App. 338, 350, 16 P.3d 45 (2000). Longo does not demonstrate a clear case of hardship or inequity. We decline to stay Longo's cross appeal.

We reverse and remand for further proceedings consistent with this opinion.

WE CONCUR: